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No. 89-1096

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

IN THE MATTER OF: H. ROGER LAWLER, *etc.*, Debtor,

H. ROGER LAWLER,
Petitioner,

VS

THEODORE A. PAULISSEN, *et ux.*,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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February, 1990

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Fifth Circuit erred, or undermined established law, in holding that actions taken in violation of the automatic stay provisions of the Bankruptcy Act of 1898 (repealed) are voidable, rather than void.

2. Whether the issues involved in the case at bar set forth "special" or "important" reasons for the granting of a writ of certiorari.

3. Whether a complaint to recover property foreclosed on during the gap period between the filing of an involuntary bankruptcy case and the adjudication of the debtor as bankrupt filed nearly six years after the foreclosure took place can be barred by a federal or state statute of limitations.

4. Whether the Petition for a Writ of Certiorari filed by Petitioner is so frivolous as to merit the granting of costs and attorneys' fees to Respondents.

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THEODORE A. PAULISSEN, *et ux.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondents Theodore A. Paulissen and May Ruth Paulissen ("Respondents") respectfully pray that the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit (the "Petition") of Petitioner H. Roger Lawler ("Petitioner") be denied and that the judgment of the Court of Appeals for the Fifth Circuit in Case No. 88-1738 entered on August 21, 1989 not be reviewed.

OPINION BELOW

Appendix A to the Petition properly contains the judgment sought to be reviewed by Petitioner.

JURISDICTION

Respondents agree that 28 U.S.C. § 1254(1) is the basis for this Court's jurisdiction asserted by Petitioner; however, Respondents deny that the decision of the Court of Appeals for the Fifth Circuit is in conflict with other decisions of this and other courts.

STATUTORY PROVISIONS INVOLVED

The Petition correctly sets forth the statutes involved herein and all are contained in the Appendix to the Petition.

STATEMENT OF THE CASE

Petitioner and a number of related entities were put into involuntary bankruptcy in Nevada on January 9, 1976. (Record Excerpts ("R.E."), p. 127, Order Granting Motion for Summary Judgment, ¶ 1.) The bankruptcy case was transferred to the Northern District of Texas on June 4, 1976 and, according to the Order granting the Respondents' Motion for Summary Judgment, on "January 17, 1978", Petitioner consented to an adjudication of bankruptcy. (R.E., p. 127, Order Granting Motion for Summary Judgment, ¶ 2.) The Original Complaint (the "Complaint") commencing this case, however, indicates Petitioner consented to the adjudication on January 20, 1978. (R.E., p. 40, Original Complaint, ¶ III.)

Petitioner purchased the real property at issue in this case from the Respondents on or about August 1, 1974 and gave the Respondents a non-recourse promissory note secured by a deed of trust, which they properly recorded in the Deed Records of Collin County, Texas. (R.E., p. 127, Order Granting Motion for Summary Judgment, ¶ 3.) Petitioner defaulted on the note and the substitute trustee under the deed of trust foreclosed on the property on "May 3, 1977" in satisfaction of the debt. (R.E., p. 128, Order Granting Motion for Summary Judgment, ¶ 4.) The trustee's deed is recorded in Book 1041, Page 649 of the Deed Records of Collin County, Texas. (R.E., p. 128, Order Granting Motion for Summary Judgment, ¶ 4.) (For the Court's information, although the May 3rd date is contained in Petitioner's Complaint, the document recorded in Book 1041, Page 649 of the Collin County, Texas Deed Records is dated March 13, 1977 and recites a March 1, 1977 foreclosure date. In addition, at the June 15, 1981 hearing on Petitioner's Application to Employ Attorney for Additional Special Purpose, Petitioner's counsel indicated that the foreclosure by Respondents had

occurred on March 13, 1977. This error, however, is legally irrelevant for the purposes of this Petition.)

Petitioner filed his Complaint alleging the Respondents had foreclosed on the Collin County property in violation of the automatic stay on December 13, 1983, nearly six years after the foreclosure sale. (R.E., p. 128, Order Granting Motion for Summary Judgment, ¶ 5.) The Complaint did not contain any allegation that Respondents knew about the pending involuntary bankruptcy case, but simply prayed that the foreclosure sale be declared null and void and that the property be conveyed back to Petitioner's bankruptcy estate. (R.E., pp. 38-43, Original Complaint.)

On May 22, 1981, Petitioner filed an application in the Bankruptcy Court asking that he be permitted to retain special litigation counsel to proceed against a number of persons alleged to have held foreclosure sales during the "gap period" between the date of the involuntary petition and the date of adjudication. (R.E., p. 3, No. 16, under Docket Entry #529.) A hearing was held on June 15, 1981, at which time the Court raised the concern that Petitioner's only motivation in pursuing these matters was the fact that the foreclosed properties had appreciated in value during the years between the 1977 foreclosure dates and 1981. (R.E., pp. 79-80 and 83-84; Record, pp. 281-82 and 285-86, Transcript of 6/15/81 hearing, pp. 7-8 and pp. 11-12.) Petitioner's counsel assured the Court that his only motivation was to provide "substantial benefits to the estate and to the creditors" and that the litigation was necessary to "preserve the estate." (R.E., p. 84; Record, p. 286, Transcript of 6/15/81 hearing, p. 12.) At no time during the hearing did Petitioner's counsel indicate that any of the numerous creditors alleged to have conducted gap period foreclosure sales had known about the pending involuntary bankruptcy case or had not complied with the notice provisions of Texas's foreclosure statutes. (R.E., p. 73-89, Transcript of 6/15/81 hearing.)

The issue of whether special counsel should be retained was continued pending further investigation of the alleged post-petition foreclosures and a second hearing was held on

July 30, 1981. (R.E., p. 88, Transcript of 6/15/81 hearing, p. 16.) At that hearing, the Court once again expressed concern about Petitioner's motivation and indicated that he would not condone litigation based on post-petition foreclosures where the only issue might be the intervening increases in the value of the foreclosed properties. (R.E., p. 92; Record, p. 355, Transcript of 7/30/81 hearing, p. 3.) The Court permitted the retention of special counsel for the sole purpose of preparing a report regarding the feasibility of the proposed litigation, but suggested that such litigation should not be brought if there was no equity for the estate in the foreclosed properties at the time of the foreclosures. (R.E., pp. 111, 117 and 119, Transcript of 7/30/81 hearing, pp. 22, 28 and 30.)

It is not clear from the Record whether the report was prepared, but docket entry #561, dated October 8, 1981, indicates Petitioner was informed that pending a determination of the solvency of the estate, his Application would be taken under advisement unless he was willing to employ counsel on a contingent fee basis. Docket entry #564, dated November 5, 1981, indicates Petitioner was not so inclined. No order was ever entered authorizing the employment of special litigation counsel. Two years later, Petitioner simply filed the lawsuit against the Respondents. In 1984, Petitioner's plan of arrangement (the "Plan") was confirmed providing a recovery to Petitioner's creditors of 100 percent of their principal and post-petition interest. (Record, p. 335.) The Plan did not provide for any treatment of Respondents' secured claim in the event Petitioner was ever successful in avoiding the gap period foreclosure at issue herein.

SUMMARY OF ARGUMENT

I. The Fifth Circuit did not err, nor undermine established law, in holding that actions taken in violation of the automatic stay are voidable, rather than void. A careful reading of the cases cited by Petitioner reveals that the Fifth Circuit's decision in this case was not in conflict with these decisions. Those courts that have actually analyzed the distinction between void and voidable in

the automatic stay context have concluded that the ability of the court to annul the stay makes a violation thereof voidable because it is capable of being cured. Therefore, while some courts use the words void and voidable interchangeably when the distinction is not at issue, the Fifth Circuit's ruling in this case was clearly in line with established case law.

II. No special or important reasons exist for granting a writ of certiorari in this case. The statute at issue was repealed twelve years ago and the current similar statute, to the extent it is relevant, contains a provision allowing the bankruptcy court to sanction intentional violators of the automatic stay. Therefore, the decision of the Fifth Circuit in this case will have no far-reaching effects on the administration of bankruptcy cases.

III. Petitioner's Complaint was time barred by both the applicable state and federal statutes of limitations. Section 11(e) of the Bankruptcy Act required the Petitioner to have filed his Complaint within two years of his adjudication as bankrupt. Therefore, the Complaint should have been filed on or before January 20, 1980. Article 5529, Tex. Rev. Civ. Stat. Ann. required Petitioner to have filed his Complaint within four years of the date the cause of action arose. Therefore, the Complaint should have been filed on or before May 3, 1981. No tolling statutes were in effect for the benefit of Petitioner and his Complaint was simply filed too late.

IV. Respondents are entitled to recover their costs and reasonable attorneys' fees. The Petition is frivolous because it involves a repealed statute and arguments which have been unsuccessful numerous times in the past.

ARGUMENT

I. The Fifth Circuit did not err, nor undermine established law, in holding that actions taken in violation of the automatic stay are voidable, not void.

Petitioner asserts that jurisdiction would be proper in this Court, pursuant to 28 U.S.C. § 1254(1), for the reason that the Fifth Circuit's decision was in conflict with *Kalb v. Feuerstein*, 308 U.S. 433 (1940), *In re Louisiana Ship Management, Inc.*, 761 F.2d 1025 (5th Cir. 1985) and "a legion of decisions from eight other federal circuit courts of appeals and numerous district and bankruptcy courts." (Petition, p. 2, and cases cited therein.) However, a careful reading of *Kalb, Louisiana Ship* and the "legion" of other decisions cited by the Petitioner reveals that the Fifth Circuit's decision in the case at bar was *not* in conflict with these decisions.

Kalb, Louisiana Ship and the "legion" of other decisions do not contain substantive holdings that actions in violation of the stay are void, as opposed to voidable, as did the Fifth Circuit's decision in the case at bar. The decisions cited by Petitioner do not analyze the void/voidable distinction and methodically reach a conclusion with respect to that distinction. Rather, the decisions cited by Petitioner merely contain *dicta*, without analysis, that actions in violation of the stay are void. However, there is an ample body of case authority that *does*, in fact, analyze the void/voidable distinction and which methodically reaches a conclusion with respect to that distinction. This case authority almost unanimously embraces the view, either explicitly or by result, that actions in violation of the stay are properly categorized as *voidable*, not void. *E.g., Sikes v. Global Marine, Inc.*, 881 F.2d 176 (5th Cir. 1989); *Albany Partners, Ltd. v. Westbrook (In re Albany Partners, Ltd.)*, 749 F.2d 670 (11th Cir. 1984); *Washington Mut. Savings Bank v. James (In re Brooks)*, 79 Bankr. 479 (Bankr. 9th Cir. 1987), *aff'd*, 871 F.2d 89 (9th Cir. 1989); *Mellor v. Pistole (In re Mellor)*, 31 Bankr. 151 (Bankr. 9th Cir. 1983), *rev'd on other grounds*, 734 F.2d 1396 (9th Cir. 1984); *Sports & Science, Ind., Inc. v. Rielly (In re Sports & Science, Ind., Inc.)*, 95 Bankr. 745 (Bankr. C.D. Cal. 1989); *Sapp v. Wilson (In re Sapp)*, 91 Bankr. 520 (Bankr. E.D. Mo. 1988); *In re Clark*, 79 Bankr. 723 (Bankr. S.D. Ohio 1987); *In re Tanksley*, 70 Bankr. 429 (Bankr. E.D. Mo. 1987); *In re Oliver*, 38 Bankr. 245 (Bankr. D. Minn. 1984); *Hadsell*

v. Philadelphia Life Ins. Co. (In re Fuel Oil Supply and Terminaling, Inc.), 30 Bankr. 360 (Bankr. N.D. Tex. 1983).

The body of case law cited above is not, as Petitioner would have this Court believe, "out of step" with established law. (Petition, p. 15.) Rather, the case law cited above technically analyzes the void/voidable issue as was necessary under the facts presented in each case. In *Kalb, Louisiana Ship* and the other cases cited by Petitioner, no technical distinction between "void" and "voidable" was necessary for the facts at issue. However, whenever such a distinction was necessary, the better-reasoned cases—and the majority of cases—hold that the "voidable" categorization is more plausible in light of the automatic stay provisions of the applicable bankruptcy statute. In summary, the Fifth Circuit's decision in the case at bar was not in error and did not undermine established law.

The Fifth Circuit's opinion in *Sikes*, rendered just four days after the Fifth Circuit's unpublished decision in the case at bar, seems to be the most comprehensive opinion analyzing the void/voidable distinction. *Sikes*, 881 F.2d at 176. In the *Sikes* opinion, the Fifth Circuit begins its analysis by considering the strict definitions of the words "void" and "voidable":

> By strict definition that which is void is nugatory and of no effect and cannot be cured; that which is voidable may be either voided or cured. [Citing *Black's Law Dictionary*, 1411 (5th ed. 1979)] . . . [W]hen "technical accuracy is desired, the term "void" can only be properly applied to those [transactions] . . . that are of no effect whatsoever, mere nullities, . . . and therefore incapable of confirmation or ratification." [citations omitted]

Sikes, 881 F.2d at 178.

The *Sikes* Court went on to conclude that actions in violation of the stay are most appropriately categorized as voidable. The *Sikes* Court's conclusion seemed to be based on three observations.

Firstly, Section 362(d) of the Bankruptcy Code of 1978 (like its predecessor, Rule 601(c) of the Bankruptcy Act) gives bankruptcy courts the power to *annul* the stay and retroactively validate violations of the stay. Section 362(d) reads:

> On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, *annulling*, modifying, or conditioning such stay . . .

11 U.S.C. § 362(d). Likewise, Rule 601(c), the predecessor of Section 362(d) under the Bankruptcy Act, reads:

> The court may, for cause shown, terminate, *annul*, modify, or condition such stay.

R. of Bankr. P. 601(c) (repealed). Thus, the bankruptcy courts have the power to annul the stay and retroactively ratify certain violations. Therefore, violations of the stay must be *voidable* as opposed to void. That which is capable of being cured or ratified is voidable. Void acts are incapable of retroactive ratification.

Secondly, the *Sikes* Court observed that Sections 549 and 542(c) of the Bankruptcy Code specifically protect certain actions taken in violation of the stay. Section 549 provides that some transactions made in violation of the stay will be deemed valid unless voided at the trustee's discretion. Section 542(c) ratifies certain transfers made by parties having no knowledge of the bankruptcy case. The Court reasoned that Sections 549 and 542(c) would be either *meaningless* or *inconsistent* with Section 362 if post-petition violations were strictly deemed *void*.

Finally, the *Sikes* Court observed that the Supreme Court's decision in *Kalb*, on which many courts have relied in stating that actions taken in violation of the stay are void, was rendered *before* the bankruptcy courts were given the express statutory power to annul the stay and grant retroactive relief. Therefore, the Fifth Circuit in *Sikes*, like the Fifth Circuit in the case at bar, simply did not believe that *Kalb*

was controlling due to the changes that had occurred in the stay provisions. Additionally, it seems that *Kalb* is not controlling since the void/voidable distinction was not of any material consequence in the *Kalb* case. In *Kalb*, the void/voidable distinction was not even analyzed. This Court merely held that a county court had been without jurisdiction to order a foreclosure and eject a debtor from his property during the pendency of the stay.

The *Sikes* decision, and the Fifth Circuit's decision in the case at bar, are not aberrations of the law. As indicated previously, many courts have reached the conclusion, either expressly or by result, that actions taken in violation of the stay are voidable not void. *E.g., Albany Partners*, 749 F.2d at 670; *Brooks*, 79 Bankr. at 479; *Mellor*, 31 Bankr. at 151; *Sports & Science*, 95 Bankr. at 745; *Sapp*, 91 Bankr. at 520; *Clark*, 79 Bankr. at 723; *Tanksley*, 70 Bankr. at 429; *Oliver*, 38 Bankr. at 245; *Fuel Oil Supply*, 30 Bankr. at 360. As noted by Judge Flowers in *Fuel Oil Supply*, "[T]he characterization of every violation of § 362 as being absolutely void is inaccurate and overly broad." *Fuel Oil Supply*, 30 Bankr. at 362. Further, as has been observed by so many courts, the word "annulling" in Section 362(d) and Rule 601(c), seems to compel the inference that violations of the stay are voidable rather than void. After all, "Annul implies a reach-back ability." *Clark*, 79 Bankr. at 725. If the bankruptcy court may "reach back" and cure, violations of the stay cannot literally be void.

In fact, the Texas courts themselves have recognized that a foreclosure conducted in violation of the automatic stay is voidable as opposed to void. In the case cited by Petitioner, *Claude Regis Vargo Enterprises, Inc. v. Bacarisse*, 578 S.W.2d 524 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.), a foreclosure sale was held in violation of the automatic stay. The Bankruptcy Court in the Southern District of Texas annulled the stay. The issue for the decision by the Texas state court was whether the filing of the petition for bankruptcy prior to the completion of the foreclosure sale rendered that sale totally invalid and of no effect. After stating initially that the sale was invalid, the Court ruled that the order of

the Bankruptcy Court annulling all stays *served to validate the action.* Said the Court "we hold that the action of the Bankruptcy Court in annulling this stay served to invalidate the stay *ab initio,* thus validating the sale conducted after the automatic stay arose upon the filing of the bankruptcy petition." *Id.* at 527.

Petitioner has cited a wealth of case law that does, in fact, state, without analyzing in depth, that actions in violation of the stay are *void ab initio. E.g., NLRB v. Edward Cooper Painting, Inc.,* 804 F.2d 934 (6th Cir. 1986); *Morgan Guaranty Trust Co. of New York v. American Savings and Loan Ass'n.,* 804 F.2d 1487 (9th Cir. 1986); *In re Louisiana Ship Management, Inc.*; *Meyer v. Rowen,* 181 F.2d 715 (10th Cir. 1950). *See also H & H Beverage Distrib. v. Dept. of Revenue of Pennsylvania,* 850 F.2d 165 (3d Cir. 1988); *Brown v. Dellinger (In re Brown),* 734 F.2d 119 (2d Cir. 1984); *Posner v. Tabone (In re Posner),* 700 F.2d 1243 (9th Cir. 1983) (cases that Petitioner cites as standing for the proposition that actions in violation of the stay are void, but which, in fact, never discuss this issue). However, Petitioner's cases must be read in the context in which they were decided. The void/voidable distinction simply was not a crucial factor in these cases. The word "annulling" in Section 362 of the Bankruptcy Code of 1978, and in Rule 601(c) under the Bankruptcy Act of 1898 (repealed), was not addressed in the cases cited by Petitioner. As observed in *Albany Partners,* "It is true that actions taken in violation of the automatic stay are generally deemed void and without effect. [citations omitted] Nonetheless, Section 362(d), [as did Rule 601(c)], expressly grants bankruptcy courts the option, in fashioning appropriate relief, of "annulling" the automatic stay, in addition to merely "terminating" it." *Albany Partners,* 749 F.2d at 675.

This option of annulling compels a conclusion that actions in violation of the stay are, in fact, voidable, not void. It is unfortunate that a number of courts, when the distinction between void and voidable is not specifically at issue, use the words interchangeably as if the concept were generic. This is why only those cases that *analyze* the distinction between

void and voidable should be considered as appropriate authority herein. There is ample authority supporting the Fifth Circuit's decision in this case. The authority relied on by Petitioner, which is seemingly to the contrary, is simply not concerned with the void/voidable distinction. Therefore, the Fifth Circuit did not err, nor undermine established law, in holding that actions in violation of the stay are voidable, not void.

II. No "special" or "important" reasons exist for granting a writ of certiorari in this case.

The Rules of the United States Supreme Court state that:

> A review on writ of certiorari is not a matter of a right, but of *judicial discretion.* A petition for a writ of certiorari will be granted *only* when there are *special* and *important* reasons therefor. The following, while neither controlling, nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter . . .
>
> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Sup. Ct. R. 10.1 (emphasis added).

It has been said that the "General public importance of the issues, and the need to secure uniformity of federal law, must be the basic touchstones" behind the Court's decision to issue a writ of certiorari. 16 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4004, p. 508 (1977). To warrant the issuance of a writ, "it must appear that the matter sought to be reviewed has at least some semblance of vitality, that is, as long as it stands it affects

some right or interest of the party applying for the writ." 14 C.J.S. *Certiorari* § 32, p. 177 (1939 & Supp. 1989). A writ should not issue "merely to give an opportunity to determine abstract, academic, hypothetical, or moot questions, even though such a determination would be of public interest." *Id.* Finally, this Court has noted that:

> [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals.

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923).

Respondents assert that the facts and issues presented by the case at bar do not raise "special" or "important" reasons for this Court to grant a writ of certiorari. None of the reasons catalogued in this Court's own rules are present in the instant case. For these reasons, Respondents oppose Petitioner's request for a writ of certiorari.

First, as discussed in the previous section, the Fifth Circuit has not rendered a decision in the case at bar that is in serious *conflict* with either a decision of another United States court of appeals on the same matter or with applicable decisions of this Court. *See* Sup. Ct. R. 10.1(a) & (c). The cases cited in Petitioner's brief, which Petitioner describes as conflicting with the Fifth Circuit's decision in the instant case, do not deal squarely with the issues presented in the instant case. No genuine disagreement exists here that cries out for resolution. No "real embarrassing conflict of opinion and authority" exists among the circuit courts of appeals. *Layne & Bowler*, 261 U.S. at 393.

Second, Petitioner has not raised a "special" or "important" federal question which has not been, *but should be*, settled by this Court. *See* Sup. Ct. R. 10.1. Petitioner has asserted that the Fifth Circuit's holding in the instant case, that actions in violation of the stay are voidable, not void,

"will encourage creditors to violate the stay and later seek retroactive sanction for the violative act." (Petition, p. 8). Petitioner warns that this "undermines the fundamental operation of the bankruptcy system." (Petition, p. 8). Surely the technical distinction between the words "void" and "voidable" in the automatic stay context will not have such far-reaching, devastating effects so as to warrant the use of this Court's valuable time.

Since the statute at issue in this case was repealed twelve years ago, the holding in this case, that violations of former Bankruptcy Rule 601(c) are voidable rather than void, will clearly have no grievous repercussions. Assuming, for the sake of argument, that the holding in this case can be used as authority for construing Section 362 of the current Bankruptcy Code, one need only turn to Section 362(h) to realize that bankruptcy courts have more than enough power to prevent the "horribles" about which Petitioner is so concerned.

Logic dictates that an involuntary debtor who has received notice under Texas law that his property is going to be foreclosed would notify his foreclosing creditors that he is involved in a bankruptcy. That way, if the creditor still proceeds with the foreclosure, he can be sanctioned under Section 362(h). In this case, it appears that a near record number of gap period foreclosures occurred leading one to conclude that Petitioner, after receiving notice of the upcoming foreclosure sales, did not bother to notify these creditors of the pending involuntary bankruptcy. It is unlikely such a problem will occur on such a regular basis as to merit the granting of the Petition in this case.

Additionally, if an interpretation that acts in violation of the automatic stay are voidable rather than void will indeed have the calamitous consequences that Petitioner anticipates, perhaps this is an issue which would best be addressed before the United States Congress. After all, the automatic stay provisions of the Bankruptcy Code clearly permit courts to retroactively annul the stay and ratify prior violations. 11

U.S.C. § 362(d) and R. Bankr. P. 601(c) (repealed). If this is bad bankruptcy policy, then Congress should be so advised.

Finally, and as stated previously, Petitioner is, in effect, asking this Court to construe a provision of the Bankruptcy Act of 1898, a statute which was *repealed* in 1978. This, of course, is the law that was in effect when the acts giving rise to this action transpired. In light of the fact that the law which would be construed by this Court was *repealed twelve years ago*, a decision by this Court would be of no precedential value. It was for this very reason that the Fifth Circuit chose not to even publish its decision in the case at bar. Rule 601(c) of the Bankruptcy Act has no "semblance of vitality." 14 C.J.S. *Certiorari* § 32, p. 177. It is a "dead letter." *Id.* While it is true that "the automatic stay under the Act . . . [was] the foundation for the same automatic stay under the Code" (Petition, p. 8) and the automatic stay provisions in effect today mirror those of prior Rule 601, this is not a basis for granting a writ of certiorari. This Court's resources would be better utilized in deciding the void/voidable issue if and when it presents itself under the Bankruptcy Code. Petitioner, by including the Fifth Circuit's opinion in the *Sikes* case in his Appendix, is apparently asking this Court to review that case as well. However, the *Sikes* parties chose not to petition for certiorari, and the *Sikes* case is not before this Court. An analysis of the void/voidable issue in *this* case involving *repealed law* would be purely academic. A writ should not issue to determine academic questions. *See* 14 C.J.S. *Certiorari* § 32. Therefore, Petitioner's Petition should be denied.

III. Petitioner's Complaint was time barred by both the applicable federal and state statutes of limitations.

The Bankruptcy Court found and the District Court and Court of Appeals affirmed that Petitioner's suit against the Respondents was time barred pursuant to the applicable statutes of limitations, Section 11(e) of the Bankruptcy Act and Article 5529, Tex. Rev. Civ. Stat. Ann.. Section 11(e) of the Bankruptcy Act provides that:

> A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law may permit, institute proceedings in behalf of the estate against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy.

11 U.S.C. § 29(e), repealed.

This statute of limitations is not limited to causes of action existing prior to bankruptcy as Petitioner would have this Court believe. In *Herget v. Central National Bank & Trust Company*, 324 U.S. 4 (1945), this Court applied the two year statute of limitations to an action to recover a preference. This Court further held that Section 11(e) is not limited to causes of action inherited by the trustee:

> SECTION 11(e) is not limited by its words to actions inherited by the trustee; nor does it discriminate against actions by the trustee accruing to him under the Act. It provides simply that the trustee must bring action on any claim on behalf of the estate within two years subsequent to the date of adjudication or within such further time as the federal or state law permits. . . .

324 U.S. at 8. In *Feldman v. First National City Bank*, 511 F.2d 460 (2nd Cir. 1975), the Court of Appeals for the Second Circuit, citing *Herget*, applied the two year statute of limitations and barred any action by the trustee to recover post-petition payments made by the bankrupt to a third party. *See also Lawler v. RepublicBank Dallas, N.A.*, 53 Bankr. 166 (Bankr. N.D. Tex. 1985), *aff'd*, No. CA3-86-1151-F (N.D. Tex. August 4, 1988), *withdrawn by agreement*, (N.D. Tex. September 6, 1988) (case involving same issues and this Petitioner.)

The Complaint in the *RepublicBank* case was also filed on December 13, 1983 and contained the same prayer as Petitioner's Complaint against Respondents. The only factual difference between the two cases is that the RepublicBank post-petition foreclosure sale took place six months prior to

the Respondents' foreclosure sale. In the *RepublicBank* case, the Bankruptcy Court held that under both applicable bankruptcy law and applicable state law, the statute of limitations had expired. Section 11(e), according to the Court, provided Lawler with a two year statute of limitations commencing from the date Lawler was adjudicated bankrupt. The Court also determined that Lawler's Complaint in the *RepublicBank* case stated a cause of action under Texas law pursuant to the Court's equity powers. Therefore, under Texas law, a four year statute of limitations was applicable. Tex. Rev. Civ. Stat. Ann. art. 5529.

The cases cited by Petitioner for the proposition that Section 11(e) is inapplicable to suits brought to recover post-petition transfers were decided years before *Herget* and *Feldman* and thus, are not controlling. It should also be noted that both of the cases cited by Lawler, *Burnham v. Todd*, 139 F.2d 338 (5th Cir. 1943) and *Stanolind Oil and Gas Company v. Logan*, 92 F.2d 28 (5th Cir. 1937), *cert. denied*, 302 U.S. 763 (1937) did not even construe Section 11(e). They interpreted Section 11(d), a provision which existed prior to the 1938 amendments, and which was superseded by Section 11(e) as well as by subsequent case law.

Petitioner's attempt to distinguish *Herget* as involving a "pre-petition preference action" is ludicrous. Preference actions are by their very nature *post*-petition actions. A "preference" is a bankruptcy term for when a debtor pays one creditor his due during a specified statutory period prior to bankruptcy to the detriment of other *pari passu* creditors. Since it is not illegal under state law to prefer one creditor over another, a preference cause of action *only* comes into existence post-petition and the preference action itself can only exist as a post-petition cause of action.

If Section 11(e) is inapplicable, the only other relevant statute of limitations must be the applicable state statute. Petitioner blithely argues that because there is no relevant statutory period provided by bankruptcy law and because he is not a trustee, he should have an unlimited amount of time in which to bring this action. Such a result would be grossly

inequitable, and case law suggests that Petitioner must look to non-bankruptcy law for a statute of limitations.

The Fifth Circuit has held that where Congress has provided no period of limitations for a federal claim, the federal courts must borrow the applicable statute of limitations from the state in which it sits. *McMillian v. City of Rockmart*, 653 F.2d 907 (5th Cir. 1981); *United Transportation Union v. Florida East Coast Railway Company*, 586 F.2d 520 (5th Cir. 1978); *Ingram v. Steven Robert Corporation*, 547 F.2d 1260 (5th Cir. 1977); *Shaw v. McCorkle*, 537 F.2d 1289 (5th Cir. 1976); *McGuire v. Baker*, 421 F.2d 895 (5th Cir. 1970). The Bankruptcy Court which decided this case sat in the State of Texas, which was also the location of the property, Petitioner and the foreclosure. The Bankruptcy Court, therefore, correctly looked to Texas law to determine whether Petitioner's action was barred by a statute of limitations.

The Court of Appeals correctly ruled that Petitioner's action in the case at bar was barred by the four year statute of limitations contained in Tex. Rev. Civ. Stat. Ann. art. 5529 (Vernon 1958). That statute is a residual limitation statute and is applied in Texas to rights of an equitable nature. *See, Burnham v. Todd*, 139 F.2d 338, 343 (5th Cir. 1943). Petitioner's pleadings in this case were a plea to the equitable powers of the Bankruptcy Court. In his Complaint, Petitioner prayed that the Bankruptcy Court declare the foreclosure on the property to be "null and void" and further prayed that an order be entered requiring the Respondents to convey all property foreclosed upon and sold in violation of the automatic stay to Petitioner's bankruptcy estate. Because Petitioner's lawsuit is a plea to the equitable powers of the Bankruptcy Court, Article 5529 is the state statute which applies in this case.

The case of *Countiss v. Baldwin*, 151 S.W.2d 235 (Tex. Civ. App.—San Antonio 1941, writ dism'd judgmt cor.), is on point. In *Countiss*, Baldwin filed an action in trespass to try title against Countiss to recover title to certain mineral interests. Baldwin's predecessor in title had executed a deed

of trust to a bank. Shortly thereafter, title to the minerals was conveyed to Baldwin. Fifteen years later, an event of default occurred under the terms of the deed of trust, and the bank foreclosed. The mineral interest was then conveyed through various grantees to Countiss. Several years later, Baldwin brought suit seeking a decree that her interest had not been foreclosed by the deed of trust sale. The Court held that Baldwin's interest was foreclosed and that Baldwin was "possessed at most, with a mere equity of redemption, as distinguished from title, legal or equitable, and such equity, if any, was barred by the four year statute of limitations, Article 5529." *Id.* at 239. This holding was subsequently approved by the Texas Supreme Court in *McGeorge v. Van Meter*, 358 S.W.2d 580 (Tex. 1962).

The case of *Ebert v. Smith*, 146 S.W.2d 432 (Tex. Civ. App.—Galveston 1940, writ dism'd judgmt cor.), is also relevant. In *Ebert*, a judgment was entered divesting the plaintiffs of title and possession to 94 acres of land. Fourteen years after the plaintiffs had been divested of their interest in the land, the plaintiffs instituted an action seeking to have the judgment set aside and asking the Court to enter an order requiring the present owner to convey the property to the plaintiffs. The Court noted, as an initial matter, that the plaintiffs were guilty of inexcusable delay in instituting their lawsuit and that they should have known that the judgment had been entered previously. Said the Court:

> That long and inexcusable delay upon their part, under well settled authority in Texas, made it the duty of the court of equity to which they applied, in passing upon their appeal to its power to relieve them from that open and public adjudication they were in duty bound to know about, to, instead, deny their delayed request as a stale demand.

Id. at 434. The Court held that even though the lawsuit was an action in trespass to try title, Article 5529 set forth a limitations period which constituted at least a *minimum period* in which a person had to bring their claim. The Court noted further that the plaintiffs had many times in their

arguments conceded that the old judgment divested them of all title to the land so that plaintiffs were left with "nothing but such an equitable or executory right of action, if any, to have it set aside as only a court of equity could take cognizance of; and that sort of an action is clearly subject to the defense of stale demand or laches. . . . " *Id.* at 435

In this case, Petitioner waited in excess of six years before he decided to take action to get the property back. In order for Petitioner to be able to set aside this sale, he had to make an equitable plea to the Bankruptcy Court asking that the properly-recorded deed of the Respondents be set aside, and that the Respondents be ordered to deliver the deed to the Petitioner. Nowhere in Petitioner's pleadings is it mentioned that his lawsuit is a trespass to try title suit, because it is not such a lawsuit, and such a lawsuit would be of no avail to him. *Hughes v. Wright,* 127 S.W.2d 215 (Tex. Civ. App.—Fort Worth 1939, no writ). Only after Petitioner lost before the Bankruptcy Court, did he come before the District Court to claim that his prayer for equitable relief was not a suit in equity and that, therefore, a ten year statute of limitations should apply. The District Court and the Court of Appeals correctly determined that this argument was without merit by affirming the decision of the Bankruptcy Court.

Petitioner emphasizes the fact that he brought the Respondents' foreclosure, as well as the other gap period foreclosures, to the Bankruptcy Court's attention on May 22, 1981 (in excess of four years after the foreclosure) and then blames the Court for the additional two and one-half years it took to file the lawsuit. While these excuses may create a defense to an allegation of laches, they are irrelevant in this case. The statute of limitations is a mechanical date and when it expires, the cause of action is gone. It is irrelevant whether the plaintiff missed the date for good cause, which in this case, the Respondents do not concede Petitioner has.

Petitioner's argument that he was waiting for the Bankruptcy Court to approve the appointment of special counsel is also without merit. The Record clearly indicates that at

the time Petitioner brought suit against the Respondents, no such approval had been received.

Petitioner asserts that even if the statute of limitations was applicable to him, it had tolled. Petitioner asserts that once he brought the potential litigation to the Court's attention on May 22, 1981, the time between May 22, 1981 and December 13, 1983 should not be counted. Petitioner forgets that on May 22, 1981, both the two year and four year statutes of limitations had *already expired.* Therefore, even if the subsequent two and one-half year delay was the Court's fault, it cannot save Petitioner in this instance.

Petitioner seeks to use the subsequent July 30, 1981 hearing as a judicial determination that the statute of limitations was tolled for him. The statement of the Court at the July 30, 1981 hearing was not a judicial finding. It was merely part of Judge Gandy's thought process in evaluating the potential litigation at a hearing on whether to allow Petitioner to retain special counsel. The issue of whether the statute of limitations had tolled for Petitioner with respect to the Respondents was not before the Court. No one briefed or researched the issue of whether Petitioner could take advantage of the trustee's tolling provisions since, at the time of the hearing, the case was still in progress and a trustee was in place. None of the bankruptcy judges before whom this case has proceeded have ever held that the applicable statute of limitations was tolled for the benefit of Petitioner.

The tolling provisions of Section 11(e) are only available to the trustee, not to the debtor. *See, Burroughs v. Local Acceptance Company (In the Matter of Dickson),* 432 F. Supp. 752, 756 (W.D. N.C. 1977), (the court, noting that while the trustee could bring suit by virtue of Section 11(e), stated "There is no tolling provision for the *debtors,* however, and so their action is barred by the statute, and will be dismissed.") (emphasis original); *see also, Costello v. Pan American World Airways, Inc.,* 295 F. Supp. 1384 (S.D.N.Y. 1969). The trustee in this case declined to bring this action against the Respondents. (Record, p. 355, Amended Application of Debtor for Authority to Employ Attorneys for Additional

Special Purpose, p. 3.) Since the trustee declined to bring this action, the Petitioner is pursuing it, and Petitioner, as the debtor, was not the beneficiary of any tolling statute.

If Petitioner was so concerned with these alleged post-petition foreclosures, he should have brought them to the Court's attention some years earlier (like sometime during the three years that elapsed between the date of adjudication and the May 22, 1981 Application) and sought a judicial determination that he was a beneficiary of the trustee's tolling provisions. It was too late to raise these issues in 1981 and it was far too late on December 13, 1983. Nor does the fact that Petitioner's confirmed Plan subsequently gave him these causes of action cure the fact that the statute of limitations had expired long before confirmation. Indeed, since in 1981, Petitioner indicated he was desirous to have gap period foreclosure sales avoided for the benefit of his creditors and since by 1984, all creditors had been paid in full, one can only hypothesize that Judge Gandy's concern about Petitioner's motivation in pursuing these lawsuits was not misplaced.

IV. Respondents are entitled to recover costs and attorneys' fees.

The Rules of the United States Supreme Court provide that:

> When a petition for a writ of certiorari, an appeal, or application for other relief is frivolous, the Court may award the respondent or appellee just damages and single or double costs. Damages or costs may be awarded against the petitioner, appellant, or applicant, or against the party's attorney or against both.

Sup. Ct. R. 42.2.

Thus, Supreme Court Rule 42.2 provides that a "frivolous" petition for a writ of certiorari may warrant the imposition of damages and costs against a petitioner and/or his attorney. Indeed, this Court has utilized this Rule in the past when the circumstances justified it. See *Hyde v. Van Wormer*, 474 U.S. 992 (1985) (damages of $500 were awarded to each of two sets of respondents following the denial of certiorari);

Hatch v. Reliance Ins. Co., 474 U.S. 1048 (1986) (damages of $500 were awarded without further explanation); *see also Tatum v. Regents of University of Nebraska*, 460 U.S. 1048 (1983) (Court denied certiorari and directed petitioner to file a response to the respondent's motion for damages; three months later the Court granted the motion and awarded $500 damages); *Potamkin Cadillac Corp. v. U.S.*, 462 U.S. 1144 (1983); *Gullo v. McGill*, 462 U.S. 1101 (1983).

Respondents assert that Petitioner's request for a writ of certiorari in the case at bar is, indeed, frivolous as contemplated by Supreme Court Rule 42.2. Therefore, Respondents respectfully move that this Court award just costs and attorneys' fees against Petitioner.

Supreme Court Rule 42.2 "sets no standards for determining when a petition for certiorari is 'frivolous,' or the amount of damages which may be 'appropriate.' " *Hyde*, 474 U.S. at 992. However, various courts of appeals have noted that an "appeal is frivolous when it involves legal points not arguable on their merits." *E.g. Hagerty v. Succession of Clement*, 749 F.2d 217, 222 (5th Cir. 1984). The *Hagerty* Court, acting under Fed. R. App. P. 38, the analog to Supreme Court Rule 42.2 in the Federal Rules of Appellate Procedure, imposed double costs and attorneys' fees against an appellant who had "imposed an unnecessary burden on th[e] court and ha[d] infringed on the rights of the appellees who [were] entitled to prompt adjudication of th[e] dispute, which had been protracted in one form or another for more than six years." *Hagerty*, 749 F.2d at 222.

The court in *Clerk v. Commissioner*, 744 F.2d 1447 (10th Cir. 1984) imposed attorneys' fees and double costs against an appellant whose arguments were "timeworn" and "legally frivolous." *Id.* at 1448. The court noted that "Courts have the inherent power to impose a variety of sanctions on both litigants and attorneys in order to regulate their docket, promote judicial efficiency, and deter frivolous filings." *Id.* at 1447 (citing *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764-67 (1980).) Finally, the court in *Ratcliff v. State of Texas*, 714 F.2d 24 (5th Cir. 1983) determined that an appeal was

frivolous and warranted the imposition of sanctions where it was "obvious" that the "appeal was prosecuted for the purpose of harassment or out of sheer obstinacy." *Id.* at 25. The court believed that the appellant had wasted the valuable time of the court.

Respondents urge this Court to utilize its authority pursuant to Supreme Court Rule 42.2 to impose attorneys' fees and costs against the Petitioner. This case was filed on December 13, 1983, nearly six years after the foreclosure sought to be avoided. While ordinarily, the avoidance of post-petition foreclosures is an important part of accumulating the assets that make up a debtor's estate so that those assets can be distributed to creditors on a *pro rata* basis, in this case, Petitioner's vigorous pursuit of this lawsuit is, to say the least, baffling.

In 1977, Respondents were secured creditors of Petitioner. If the decision of the Fifth Circuit were to be reversed, the case would go back to the Bankruptcy Court for trial on the merits. Respondents would attempt to prove that they had no actual or constructive knowledge of the pending involuntary bankruptcy case, that they had notified Petitioner of the foreclosure and that the value of the property was equal to the amount of the debt owed by Petitioner at the time of the foreclosure. If the property at issue herein were returned to Petitioner because the foreclosure was invalidated, Respondents would, once again, become secured creditors of Petitioner, and, if Petitioner failed to pay the principal and interest due and owing on the note evidencing the debt, Respondents would, once again, be entitled to foreclose on the property securing the debt.

As Petitioner aptly quotes in the Petition: the automatic stay "permits the debtor to attempt a repayment or reorganization plan." H.R. No. 595, 95th Cong., 1st Sess. 340-42 (1977). In this case, Petitioner, in 1984, confirmed his Plan which paid his creditors in full. Therefore, the purpose of the bankruptcy laws was fulfilled six years ago. Petitioner is either proceeding with this lawsuit on the belief that he can avoid a secured creditor's foreclosure *and* avoid repaying the

related debt, or Petitioner is, as Judge Gandy feared, using the bankruptcy system to recover property for his own (as opposed to his creditors') benefit because it has appreciated in value since the foreclosure date, thirteen years ago.

Petitioner has been a party to approximately fifteen lawsuits against his creditors and the trustee arising out of his bankruptcy case, all of which he continued to pursue years after confirmation of his Plan. As noted by Judge Akard in *Lawler v. Brinkerhoff*, 74 Bankr. 991 (Bankr. N.D. Tex. 1987), Petitioner has a "seemingly inexhaustible supply of funds for attorneys' fees" and "continuous litigation", and "has apparently appealed every adverse ruling made by a Bankruptcy Judge in this case." *Id.* at 995-96 and f.n.1. The facts of this case and Petitioner's long standing litigious nature seriously bring into question the good faith of Petitioner in pursuing this matter.

In addition to the foregoing, Respondents believe this Petition is wholly frivolous for the reason that it does not involve "special" or "important" questions of federal law around which a genuine conflict currently exists. Petitioner is wasting the valuable time of this Court and of the Respondents.

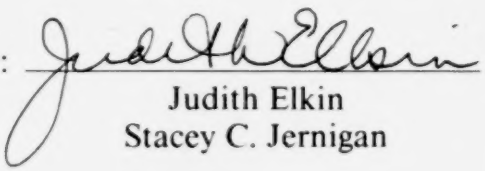
Therefore, Respondents respectfully pray that this Court award appropriate costs and attorneys' fees to Respondents pursuant to Supreme Court Rule 42.2.

CONCLUSION

The issues involved in this case simply do not present special or important reasons for the granting of a writ of certiorari. The Court of Appeals for the Fifth Circuit did not err or undermine established law in holding that a violation of the automatic stay provisions of the Bankruptcy Act of 1898 (repealed) was voidable rather than void, and that therefore, Petitioner's Complaint was barred by the applicable statute of limitations. Therefore, Respondents respectfully pray that Petitioner's Petition for a Writ of Certiorari be denied and that Respondents be awarded costs and attorneys' fees from Petitioner.

RESPECTFULLY SUBMITTED THIS 9TH DAY OF FEBRUARY, 1990.

HAYNES AND BOONE

By: 
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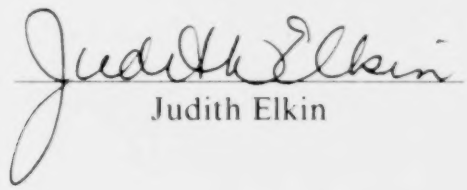
CERTIFICATE OF SERVICE

I hereby certify that 3 copies of this Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit have been served upon Petitioner, H. Roger Lawler, by depositing the copies in the United States mail with first-class postage prepaid, addressed to Petitioner's counsel of record, C. Thomas Wesner, Jr., Esq., Wesner Coke Boyd & Clymer, P.C., 5430 LBJ Freeway, LB 7, 660 Three Lincoln Centre, Dallas, Texas 75240 on February 9th, 1990.

All parties required to be served have been served.



Judith Elkin